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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 LARRY JOHN FARRIS, III,

11 Petitioner,

No. CIV S-04-1758 GEB KJM P

12 vs.

13 SCOTT M. KERNAN, Warden,

14 Respondent.

FINDINGS AND RECOMMENDATIONS

15 _____/
16 Petitioner is a state prison inmate proceeding with counsel with an amended
17 petition for a writ of habeas corpus. He challenges his Placer County conviction for robbery and
18 use of a firearm on the ground that he did not receive the effective assistance of counsel.

19 This court held an evidentiary hearing and directed the parties to provide
20 additional records.

21 I. Factual Background

22 On June 29, 2001, two masked men robbed the Millenium¹ Smoke Shop in
23 Roseville, making off with money and “an unknown quantity of smoking bongs” Lodged
24 Document (Lodg. Doc.) 9 at 3, 5 (police reports).

25 _____
26 ¹ The court uses the spelling of the business as shown on the reward poster. Lodg. Doc.
17.

1 Robin Giffin, the owner of the smoke shop, prepared a reward poster, showing a
2 rare smoking pipe taken in the robbery and offering a \$5,000 reward. Id. at 12; Lodg. Doc. 17
3 (reward poster).

4 On July 12, 2001, Detective Michael Allison of the Roseville Police Department
5 met with Giffin, who reported he had learned of the robbers' identity from a customer, whom he
6 declined to name, who in turn had received information from someone else, to whom the robbers
7 had confessed. Lodg. Doc. 9 at 15-16. The robbers allowed the customer's friend to use one of
8 the pipes taken in the robbery; Giffin identified it. Id. Allison received additional information
9 from Giffin on July 13 and 17. Id. at 16-17.

10 During the early morning hours of July 18, 2001, Mark Reynolds was getting out
11 of his car when he was approached by two men, one Hispanic, one white. Reynolds identified
12 the white man, who was armed with a stun gun, as William Scott Planer, but could not identify
13 the Hispanic man, who had been armed with a gun. Pet., Ex. 6 at 23. Reynolds gave Planer his
14 wallet, cell phone, and a backpack containing marijuana. Id. at 23, 25-26. Police located Planer
15 at his home and arrested him for the robbery. Id. at 26. Planer was with Zachary Miller, who had
16 Reynolds' Hollywood Video card. Id. at 29. Police brought Reynolds to Planer's house; he
17 identified Planer as one of the robbers but said Miller had not been present during the robbery.
18 Id. at 31.

19 On July 20, 2001, Allison prepared an affidavit for a warrant to search petitioner's
20 apartment. The affidavit reads in relevant part:

21 On June 29, 2001 Alma Rodriguez was the victim of an armed
22 robbery that occurred at 1079 Sunrise Ave., Suite M Roseville,
23 CA. Rodriguez was working with two other employees (Biagi,
24 Martinez) at the Millenium Smoke Shop at approximately 2205
25 hours when the robbery occurred. Rodriguez had just closed the
26 shop for the night and was exiting the rear door to the business
when she encountered the two suspects. The suspects ordered all
three employees back into the business at gunpoint. Both suspects
were armed with handguns that they readily displayed to the
employees. One of the suspects threatened to shoot the employees
if they did not do as they were instructed. The suspects directed

1 the victims into the office of the business where they robbed them
2 of their personal property, including Biagi's wallet. The suspects
3 brought their own duffle bag with them to carry the stolen
4 merchandise. The suspects used duct tape to secure the three
5 employee's [sic] hands. The suspects brought the duct tape in with
6 them to the robbery. When the suspects were in the office they
7 ordered Rodriguez to remove all of the valuables from the safe,
8 including an undisclosed amount of cash. The suspects then
9 directed Rodriguez to several cash registers in the business,
10 ordering her to open them and retrieve the cash from them. The
11 money was then given to the suspects. The suspects also took a
12 large amount of merchandise from the business. The merchandise
13 was very distinctive in appearance. The property taken was
14 numerous hand-blown water pipes. One of the pipes that was
15 taken was very distinctive in size and appearance. The suspects
16 were in the business for approximately 15 to 20 minutes before
17 they fled. Before fleeing, the suspects took the telephone receivers
18 from the phones in the business. Both suspects were described as
19 wearing masks, surgical gloves, and black "Raiders" shirts.

20 On July 9, 2001, your affiant was assigned follow up investigation
21 on the aforementioned robbery. Your affiant met with Robin
22 Giffin, the owner of the Millenium Smoke Shop, at approximately
23 1000 hrs on July 12, 2001. Giffin reported he had a confidential
24 informant that told him who robbed his shop. He said the
25 informant told him Brent Forman and Larry Farris were
26 responsible for the robbery. Giffin told your affiant that this
informant had received the information from a friend who knew
Forman and Farris. Giffin told your affiant that his informant was
informed by his friend that Forman and Farris had confessed to him
that they had committed the robbery. Furthermore, Giffin's
informant said his friend was actually given one of the glass pipes
that was taken in the robbery by Forman and Farris. Your affiant
was told by Giffin that his informant was allowed to take the pipe
to use it. Giffin told your affiant that his informant brought the
pipe to him and showed it to him. Your affiant was told by Giffin
that he viewed the pipe and positively identified it as one of the
pipes that was stolen in the robbery. Giffin told your affiant that his
informant was told by his friend that Farris had one of the stolen
pipes at his apartment. The pipe was a large, very distinguishable,
hand-blown water pipe. Giffin gave your affiant a photograph of
the pipe for reference.

27 On July 13, 2001, your affiant met with Giffin a second time.
28 Giffin told your affiant that he had learned where Farris lived.
29 Giffin told your affiant his informant obtained Farris' telephone
30 number from the friend that had given him the stolen pipe. Giffin
31 said he called the telephone number and a female answered the
32 phone. Giffin told your affiant that he terminated the call when the
33 female answered the phone. Giffin indicated he immediately
34 received a return call from the residence he had called. He said the

1 caller I.D. on his telephone identified the caller as Dana Moyer at
2 302 Hendry Circle Rocklin, CA.

3 On July 17, 2001 your affiant went to the address Giffin identified
4 as Farris'. The address was actually part of the Stanford Heights
5 apartment complex at 5801 Little Rock Rd Rocklin, CA. Farris'
6 apartment was in the complex and had a separate address of 302
7 Hendy Circle, Rocklin, Ca. I contacted the apartment manager and
8 discovered that Farris was one of the individuals who leased the
9 apartment.

10 On July 20, 2001, your affiant spoke with Giffin via telephone at
11 his place of business. Giffin told your affiant he had just spoken to
12 his informant. Giffin said his informant indicated that Farris and
13 Forman had sold most of the stolen glass pipes, except for the
14 largest one. Giffin indicated his informant told him the large pipe
15 was still at Farris' apartment. Giffin told your affiant his informant
16 wished to remain confidential because he was afraid for his safety.
17 Giffin indicated his informant turned down a \$5,000 dollar reward
18 to reveal whom his friend was that received the stolen pipe. Giffin
19 informed me that he knew who both the suspects were because
20 they had been previous customers. He said he remembered seeing
21 both suspects in his store, not necessarily at the same time. Giffin
22 told your affiant he has seen Forman in his business since the
23 robbery. He indicated Forman asked him questions about the
24 circumstances of the robbery. Giffin also informed your informant
25 he has seen both Forman and Farris together in the past. He
26 indicated that he has seen Farris driving in a blue Ford Expedition.
When your affiant contacted the manager at the apartment complex
where Farris lives, I was informed that he drives a blue 1998 Ford
Expedition.

Additional facts to support the probable cause to issue the warrant:
Forman is on informal court probation for a conviction of 417.4
P.C. –Brandishing an imitation firearm. During the robbery at the
Mellenium [sic] Smoke Shop, Biagi (victim) reported that the guns
that the suspects were holding looked “fake and toyish.” Finally,
the description of the two robbery suspects is similar to Farris and
Forman. Farris' drivers license describes him as 6-2 tall, 213 lbs,
with brown hair and brown eyes. One of the suspects from the
Mellenium [sic] robbery was described as 6-0 tall weighing 200
lbs. Forman is described as 5-8 tall weighing 134 lbs. The other
suspect from the Mellenium [sic] robbery was described as 5-8 to
5-10 tall weighing 150 to 170 lbs.

Petitioner's Evidentiary Hearing Exhibits (PEHE), Ex. 5.

Allison drafted the affidavit and gave it to the District Attorney's Office for
review; Jeff Penny and Bill Markie approved it. Lodg. Doc. No. 9 at 18.

1 Police executed the search warrant at 11:00 p.m. on July 20, 2001; Forman, Farris
2 and Dana and Sabrina Moyer were in the apartment. Id. at 18-19. Forman told officers there was
3 a loaded 9 mm gun in a bedroom closet and Farris told them there was quarter of an ounce of
4 marijuana in the freezer. Id. at 19.

5 Dana Moyer told police that Forman and petitioner had robbed a bong shop in
6 Roseville and had returned with two back packs full of bongs. They sold most of the bongs, but
7 one was on top of the entertainment center. Id. at 20.

8 After waiving his Miranda rights, petitioner admitted he had robbed Mark
9 Reynolds in July 2001 along with Forman and Scott Planer and that he, Forman, and Joshua
10 Merritt committed the robbery of the Millenium smoke shop. Id. at 21-22. He said one of the
11 bongs was in the living room. Id. at 22.

12 Shortly after midnight on July 21, 2001, Roseville police officers went to
13 Merritt's home and placed him under arrest. After waiving his Miranda rights, Merritt related
14 that Farris and Forman had placed the Millenium robbery; that he and Farris had actually
15 committed the robbery while Forman waited in the car; and that Farris had given him an
16 electronic scale and one of the bongs taken in the robbery. Id. at 23.

17 On August 23, 2001, following a guilty plea, Zachary Miller gave a statement
18 about the Reynolds robbery to the Placer County District Attorney's office. Pet., Ex. 6 at 32.
19 Miller told authorities that on the night of the Reynolds robbery, he met with Planer and Forman
20 and a person named "Larry." Planer gave Forman his car keys and told Forman and Miller to
21 drive around while he and Larry obtained some marijuana from Reynolds. Id. at 33. When
22 Planer and Larry returned to the car, they had a backpack that smelled of marijuana. Larry gave
23 Miller a Hollywood Video card with Reynolds' name on it. Miller described Larry as a white
24 male, 18-19 years old, who drove a blue Ford Explorer and lived with his girlfriend. Id.

25 In August 2001, Kevin Burdick was appointed to represent petitioner. Docket No.
26 49 (case file, Placer County Superior Court Case No. 62-002839). Burdick has been a criminal

1 defense attorney in Placer County for twenty years. RT 8. His file, which was obtained by
2 habeas counsel, contains a copy of the search warrant and affidavit, included with other
3 discovery provided to Burdick on August 29, 2001. See Docket. No. 51 (Burdick file; Discovery
4 Request And Record And District Attorney Offer, dated 8/29/01). On that date, Burdick billed
5 for reviewing the discovery and talking to petitioner. See Docket No. 58 (Sealed Billing
6 Records). At the evidentiary hearing, Burdick testified it is his practice to “review suppression
7 issues from the outset.” RT 16. He does not recall, however, whether he conducted any legal
8 research in this case. RT 18. His billing records do not reflect time for research.

9 Petitioner and his mother, Kelley Farris, testified, however, Farris went to
10 Burdick’s office sometime in August 2001, shortly after Burdick had been appointed to represent
11 petitioner. RT 53-54, 81. They met for ten to fifteen minutes to discuss the charges and Burdick
12 told them the prosecutor would probably offer a three to five year plea deal. RT 54, 67, 82.
13 Burdick told them petitioner should definitely take the deal because the charges were very
14 serious. RT 54. Burdick did not mention the possibility of a motion to suppress and did not
15 discuss the affidavit in support of the search warrant. RT 55, 83. Burdick did not suggest there
16 was any way to leverage a better offer or even inform petitioner of his maximum exposure if he
17 were convicted of all the charges. RT 55, 82.

18 According to Burdick, however, he discussed with petitioner the feasibility of
19 making a motion to suppress the evidence seized under the authority of the search warrant, as
20 was his practice. RT 5. He did not, however, file a motion to suppress because he did not
21 believe it would be successful, in part because of the overwhelming evidence against petitioner.
22 RT 6.

23 On August 31, 2001, a first amended complaint was filed in Placer County
24 Superior Court, charging petitioner and Forman with conspiracy to commit robbery, three counts
25 of second degree robbery and three counts of false imprisonment by violence, all stemming from
26 the Millenium Smoke Shop robbery. The complaint also charged petitioner and Forman with

1 conspiracy to commit robbery, second degree robbery, false imprisonment by violence and
2 receiving stolen property, all arising from a robbery of Mark Reynolds. Finally, it was alleged
3 that petitioner personally used a gun in connection with several of the counts and that a principal
4 in the offenses was armed with a firearm. Respondent's Evidentiary Hearing Exhibits (REHE),
5 Ex. G.

6 Before one of the court appearances, Burdick pulled petitioner aside and said that
7 the prosecutor's offer was for thirteen years. RT 83. Petitioner said he did not want to accept
8 that offer, but Burdick encouraged him to accept it. RT 83-84.

9 Petitioner was facing federal charges at the same time, and Kelley Farris hired
10 Kathryn Druliner to represent him on the federal charges. RT 57, 101. Druliner reviewed
11 petitioner's state case, offered him a second opinion on it, and attempted to talk to Burdick about
12 it. RT 101-102. She also called the district attorney's office, but the deputy handling the case
13 would not talk to her because she was not the attorney on the Placer County case. RT 116. From
14 her experience in practicing in Placer County, however, Druliner believes that the prosecutors
15 "do not negotiate, you do not get a deal." RT 118.

16 Druliner was able to secure a copy of the discovery from Burdick, but only after
17 asking for it on three occasions. RT 109. At some point, Druliner met Burdick in court in Placer
18 County and requested a copy of the Placer County discovery from Burdick. RT 15. Although
19 she also asked for a copy of the search warrant and supporting affidavit, she avers Burdick did
20 not provide them to her. RT 110-111; PEHE, Ex. 15 ¶¶ 4, 7 (Declaration of Kathryn Druliner) &
21 Ex. 10 ¶¶ 15-16 (Declaration of Kelley Farris); cf. PEHE, Exs. 12 (Druliner's letter to Burdick
22 requesting file including search warrant affidavit), 13 (Druliner's letter to Burdick
23 acknowledging receipt of "discovery"). Druliner ultimately wrote to Burdick, outlining
24 petitioner's dissatisfaction with his representation. RT 103-104.

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1 On October 12, 2001, petitioner told the court he wanted new counsel, so the
 2 court held a Marsden hearing.² Petitioner told the court he had problems getting in touch with
 3 Burdick and that Burdick had not provided him copies of the discovery in a prompt fashion.
 4 PEHE, Ex. 7 at 5-6. Burdick stated in response:

5 I have talked to him about issues with – relating to his, his
 6 statements and what motions we might bring and might not bring;
 7 however, I have not taken any action at this time basically because
 8 I was waiting to see whether the case would settle fairly quickly in
 a favorable basis and what was going to happen with his federal
 charges and how that might impact this case. . . .

9 Id. at 7. At the evidentiary hearing, Burdick acknowledged that this was correct. RT 25.

10 Petitioner told the court that Druliner had been giving him a second opinion on
 11 this case, but that his mother could not afford to pay her fees for the state case as well. PEHE,
 12 Ex. 7 at 6, 8-9. Burdick acknowledged he had received a letter from the “second opinion”
 13 lawyer. Id. at 7.³ The court denied the Marsden motion. Id. at 10.

14 Burdick was involved in conversations with Deputy District Attorneys David
 15 Tellman and Estelle Tansey. DEHE, Exs. K ¶ 6 & L ¶ 5 (Tellman and Tansey Declarations). For
 16 a while, Burdick was attempting to resolve the state and federal cases globally, in conjunction
 17 with Ms. Druliner. RT 6. Tellman believed that defendant faced at least twenty-five years in
 18 prison, but offered Burdick a plea agreement that would result in a fourteen year sentence.
 19 DEHE, Ex. K ¶¶ 7-8. According to Tellman, it was his practice to make a plea offer shortly after
 20 arraignment, with the offer remaining viable for a limited time only. RT 127-128. He would
 21 generally not keep an offer open if he had to prepare an opposition to a defense motion. Id. His
 22 practice is to inform defense counsel that the offer would be held open until “the start of
 23

24 ² People v. Marsden, 2 Cal.3d 118 (1970).

25 ³ In the letter, Druliner advises Burdick that petitioner is concerned about Burdick’s
 26 failure to “develop[] the facts” that might support a motion to suppress his statement. Pet., Ex. 13.

1 whatever the next stage is, the preliminary hearing, motion to suppress, pretrial motions,
2 whatever” RT 129. Most defense counsel who practice in the county understand this. Id.
3 According to Deputy District Attorney Estelle Tansey, the Placer County District Attorney’s
4 Office had an informal policy of rescinding offers, particularly good offers (a percentage of total
5 exposure), if litigation proceeded. RT 157-158. Generally, if she “had to do the work to respond
6 to the motion,” an offer would be withdrawn. RT 160; DEHE, Ex. K, ¶¶ 10, 11 & Ex. L ¶¶ 7-8.
7 Burdick also said the district attorney’s office would not hold an offer open while the defense
8 pursued pretrial litigation: “offers are only held open until they’re withdrawn” because “that is
9 the culture of the county.” RT 9.

10 Burdick recalled that Tellman made petitioner an eleven year offer, but it was
11 withdrawn before they could accept it. RT 6-7. Once the co-defendant made an agreement to
12 testify against petitioner, the offer increased to fourteen years. RT 7. Neither party has presented
13 any evidence suggesting which co-defendant agreed to testify against petitioner. Burdick’s file,
14 however, contains a copy of Joshua Merritt’s probation report, showing that Merritt had pleaded
15 no contest to robbery and firearms use on November 2, 2001. Docket No. 51 (Probation Report
16 at 6). The report does not refer to any plea agreement for testimony, but it does contain Merritt’s
17 statement to the probation officer implicating petitioner in the robbery of the smoke shop. Id.
18 (Probation Report at 8-10).

19 Burdick met with petitioner and his mother on a couple of occasions and told
20 them the prosecution had extended a plea offer with a sentence of fourteen years. RT 7; PEHE,
21 Ex. 8 (Petitioner’s Declaration) ¶ 5. Burdick counseled petitioner to accept the offer and said he
22 did not want to do anything to anger the prosecutor. Id. Burdick also told him the case was
23 hopeless because of petitioner’s and Merritt’s confessions, and petitioner “had to accept whatever
24 offer they made.” Id. ¶ 9; DEHE, Ex. M (Burdick Declaration) ¶ 3. According to petitioner,
25 Burdick never advised him of the possibility of filing a motion to suppress. Pet., Ex. 8 ¶ 2.

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Burdick avers:

I considered bringing a suppression motion challenging the search warrant. However, in my professional opinion, the possibility that a suppression motion would be denied carried too great a risk for Mr. Farris in terms of the subsequent likelihood of his conviction at trial and the potential length of his prison term. I believed that a fourteen-year prison sentence would be better than gambling with a potentially longer prison sentence, even if that gamble also carried the possibility of a successful suppression motion that would lead to the reduction or dismissal of the charges.

I explained to Mr. Farris my beliefs He appeared to understand my opinion and he agreed with my assessment. I fully believed that he was in favor of accepting the offer.

DEHE, Ex. M ¶¶ 4-5.

Burdick did not recall how many times he met with petitioner to discuss the case, nor the length of any of the meetings. RT 13. The billing records show ten contacts, in person, by letter or by telephone with petitioner, and one with his mother. See Docket No. 58. Petitioner says he camped out in front of Burdick's office and eventually was able to meet with him for five to ten minutes. RT 84. Burdick told him the offer had increased to fourteen years. RT 85. Burdick advised petitioner to take the deal because "there was no way we could beat this." Id. Petitioner did not have any other meetings with Mr. Burdick about the case, even though both he and his mother called Burdick numerous times. RT 56, 86.

The minutes for October 24, 2001⁴ contain the following notation: "DA-Offer Plea to 211 PC Admit 12022.5 All. Plea to ct. 9 211 PC Harvey Bal. 14 yr CDC." Docket No. 49-2. The accompanying reporter's transcript documents petitioner's waiver of the preliminary

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⁴ Although the minutes list 10/23/01 as the date, it appears that this hearing took place on October 24, 2001. The reporter's transcript of the waiver of preliminary hearing gives the date as October 24; the minutes document the waiver of preliminary hearing and the holding order.

1 hearing and the following:

2 MR. TELLMAN: Yes. And we would state for the record the
3 offers that have been made prior to the waiver and that they would
4 remain open until the trial confirming conference.

5 THE COURT: State it for the record.

6 MR. TELLMAN: For the record, as to Mr. Farris, our offer is to
7 plead to one count of Penal Code Section 211 as it relates to the
8 June 29th, of this year, incident, and admit the 12022.53 allegation
9 as to that 211 and a plead [sic] to Count 9, which is a violation of
10 211 as to Mark Reynolds with a Harvey waiver as to the balance
11 for a stipulated 14 years in prison.

12 Id. (10/24/01 RT 6). The court then set the trial confirming date for December 14, 2001, noting
13 that would “be the last date for motions, if there are any motions.” Id. (10/24/01 RT 7).

14 On February 19, 2002, petitioner entered a plea of guilty to one count of robbery
15 arising from the Millenium Smoke Shop incident and one count of robbery of Mark Reynolds
16 and admitted that he personally used a firearm in connection with the Millenium robbery in
17 exchange for a stipulated sentence of fourteen years. Lodg. Docs. 3 (plea form) & 11 (transcript
18 of entry of plea). Petitioner had decided to plead guilty because he did not feel confident going
19 to trial with Burdick. RT 97. Had petitioner known that a motion to suppress was a possibility,
20 he would not have accepted the plea offer. RT 87. However, petitioner did not have a chance to
21 review the affidavit in support of the search warrant until the state proceedings were concluded.
22 RT 88-89.

23 Petitioner did not appeal his conviction. However, on June 28, 2003, he filed a
24 petition for a writ of habeas corpus in the Placer County Superior Court, raising a claim of
25 ineffective assistance of counsel. Lodg. Doc. 5. This was followed by petitions in the Court of
26 Appeal for the Third Appellate District and a petition for review in the Supreme Court. Lodg.
Docs. 6 and 7.

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1 The Superior Court issued the only reasoned decision resolving the state habeas
2 petitions:

3 The petition for Writ of Habeas Corpus is denied for the reason
4 that petitioner fails to present sufficient grounds for relief as
requested.

5 Petitioner bears the burden of stating a prima facie case showing
6 that he is entitled to relief. . . . In that regard, petitioner is obliged
7 to state with particularity the facts upon which the petition is
based; vague, conclusory [sic] allegations are insufficient to
warrant issuance of a writ. Petitioner has the burden of proving the
8 facts upon which he bases his claim for relief.

9 Petitioner raises a claim of ineffective assistance of counsel. To
10 prevail on such a claim, petitioner has the burden of demonstrating
11 that but for the failings of counsel, a more favorable result would
have been obtained. While petitioner alleges the fact of ineffective
assistance of counsel, he has wholly failed to present any evidence
that the results of his case would be any different.

12 Pet., Ex. 1 at 1-2 (internal citations omitted).

13 II. Standards Under The AEDPA

14 An application for a writ of habeas corpus by a person in custody under a
15 judgment of a state court can be granted only for violations of the Constitution or laws of the
16 United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any
17 claim decided on the merits in state court proceedings unless the state court's adjudication of the
18 claim:

19 (1) resulted in a decision that was contrary to, or involved an
20 unreasonable application of, clearly established federal law, as
determined by the Supreme Court of the United States; or

21 (2) resulted in a decision that was based on an unreasonable
22 determination of the facts in light of the evidence presented in the
State court proceeding.

23 28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”). See Ramirez v. Castro,
24 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court's grant of habeas relief
25 under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth
26 Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538

U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did not address the merits of petitioner's Eighth Amendment claim).⁵ Courts are not required to address the merits of a particular claim, but may simply deny a habeas application on the ground that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v. Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district courts to review state court decisions for error before determining whether relief is precluded by § 2254(d)). It is the habeas petitioner's burden to show he is not precluded from obtaining relief by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are different. As the Supreme Court has explained:

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in Williams [v. Taylor], 529 U.S. 362 (2000)] that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8 (2002).

⁵ In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals held in a § 2254 action that "any independent opinions we offer on the merits of constitutional claims will have no determinative effect in the case before us . . . At best, it is constitutional dicta." However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title 28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71; Ramirez, 365 F.3d at 773-75.

1 The court will look to the last reasoned state court decision in determining
2 whether the law applied to a particular claim by the state courts was contrary to the law set forth
3 in the cases of the United States Supreme Court or whether an unreasonable application of such
4 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S.
5 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial
6 of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court
7 must perform an independent review of the record to ascertain whether the state court decision
8 was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other
9 words, the court assumes the state court applied the correct law, and analyzes whether the
10 decision of the state court was based on an objectively unreasonable application of that law.

11 It is appropriate to look to lower federal court decisions to determine what law has
12 been "clearly established" by the Supreme Court and the reasonableness of a particular
13 application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999).

14 III. Analysis

15 Petitioner argues that Burdick did not act effectively in advising him to plead
16 guilty without discussing the possibility of pursuing a motion to suppress the evidence seized
17 from his apartment. Pet. at 3-8.

18 In Hill v. Lockhart, the Supreme Court explored the question of an attorney's
19 effectiveness in advising a criminal defendant to plead guilty:

20 [A] defendant who pleads guilty upon the advice of counsel may
21 only attack the voluntary and intelligent character of the guilty plea
22 by showing that the advice he received from counsel was not
within the standards set forth in McMann.⁶

23 474 U.S. 52, 56-57 (1985). The Court continued: the "two-part *Strickland v. Washington* test
24 applies to challenges to guilty pleas based on ineffective assistance of counsel." Id. at 59. Under

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26 ⁶ McMann v. Richardson, 397 U.S. 759 (1970).

1 that two part test, a “defendant must show that counsel’s performance was deficient. This
2 requires showing that counsel made errors so serious that counsel was not functioning as the
3 ‘counsel’ guaranteed by the Sixth Amendment. Second, the defendant must show that the
4 deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687
5 (1984).

6 Under Strickland, a court faced with a claim of ineffective assistance of counsel
7 must presume that counsel was competent, a presumption that a habeas petitioner or criminal
8 appellant must rebut. Id. at 689. The Court in Strickland provided some guidance on the
9 evaluation of the “performance” prong of its test:

10 strategic choices made after thorough investigation of law and facts
11 relevant to plausible options are virtually unchallengeable; and
12 strategic choices made after less than complete investigation are
13 reasonable precisely to the extent that reasonable professional
14 judgments support the limitations on investigation. In other words,
15 counsel has a duty to make reasonable investigations or to make a
reasonable decision that makes particular investigations
unnecessary. In any ineffectiveness case, a particular decision not
to investigate must be directly assessed for reasonableness in all
the circumstances, applying a heavy measure of deference to
counsel's judgments.

16 Id. at 690-91; see Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (“we have found
17 counsel to be ineffective where he neither conducted a reasonable investigation nor made a
18 showing of strategic reasons for failing to do so.”). Counsel’s actions cannot be judged from a
19 position of hindsight, but must be evaluated “from counsel’s perspective at the time” of the
20 alleged error. Strickland 466 U.S. at 689.

21 To establish the second, or prejudice, prong of Strickland’s test: a petitioner “must
22 show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result
23 of the proceeding would have been different. A reasonable probability is a probability sufficient
24 to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. When the claim is that

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1 counsel's ineffectiveness prompted petitioner to plead guilty without a complete understanding
2 of his options:

3 The second, or "prejudice" requirement . . . focuses on whether
4 counsel's constitutionally ineffective performance affected the
5 outcome of the plea process. In other words, to satisfy the
6 "prejudice" requirement, the defendant must show that there is a
7 reasonable probability that, but for counsel's errors, he would not
8 have pleaded guilty and would have insisted on going to trial.

9
10 [W]here the alleged error of counsel is a failure to investigate or
11 discover potentially exculpatory evidence, the determination
12 whether the error "prejudiced" the defendant by causing him to
13 plead guilty rather than to go to trial will depend on the likelihood
14 that discovery of the evidence would have led counsel to change
15 his recommendation as to the plea. This assessment, in turn, will
16 depend in large part on a prediction whether the evidence likely
17 would have changed the outcome of a trial.

18 Hill, 474 U.S. at 59.

19 The Supreme Court has defined Strickland's prejudice prong when the allegation
20 is a failure to litigate a motion to suppress:

21 Where defense counsel's failure to litigate a Fourth Amendment
22 claim competently is the principal allegation of ineffectiveness, the
23 defendant must also prove that his Fourth Amendment claim is
24 meritorious and that there is a reasonable probability that the
25 verdict would have been different absent the excludable evidence
26 in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375 (1986); see also Bailey v. Newland, 263 F.3d 1022,
1029 (9th Cir. 2001).

 Petitioner argues that the affidavit in support of the search warrant did not provide
probable cause for the search and that trial counsel's failure to file a motion to suppress or even
advise petitioner about the possibility of pursuing such a motion rendered Burdick's advice
regarding the plea offer untenable.

 Respondent counters that Burdick had valid, tactical reasons for eschewing a
motion to suppress: by making a motion, he would have caused the prosecutor to withdraw a

1 favorable plea offer and the motion was not likely to succeed.

2 Under either the Hill or Kimmelman test, and to resolve the parties' competing
3 claims, the court must consider the viability of the motion to suppress.⁷

4 A. The Search Warrant Affidavit

5 The basic requirement for the issuance of a search warrant is that it be supported
6 by probable cause:

7 Probable cause exists where 'the facts and circumstances within
8 their (the officers') knowledge and of which they had reasonably
9 trustworthy information (are) sufficient in themselves to warrant a
man of reasonable caution in the belief that' an offense has been or
is being committed.

10 Brinegar v. United States, 338 U.S. 160, 175-76 (1949) (quoting Carroll v. United States, 267
11 U.S. 132, 162 (1925)). The same standard applies even if the affidavit is based on hearsay:

12 The task of the issuing magistrate is simply to make a practical,
13 common-sense decision whether, given all the circumstances set
14 forth in the affidavit before him, including the "veracity" and
15 "basis of knowledge" of persons supplying hearsay information,
16 there is a fair probability that contraband or evidence of a crime
will be found in a particular place. And the duty of the reviewing
court is simply to ensure that the magistrate had a 'substantial basis
for ... conclud[ing]' that probable cause existed.

17 Illinois v. Gates, 462 U.S. 213, 238 (1983); see also Jones v. United States, 362 U.S. 257, 269
18 (1960) ("an affidavit is not to be deemed insufficient" because it is based on hearsay "so long as
19 a substantial basis for crediting the hearsay is presented"), overruled on other grounds, United
20 States v. Salvucci, 448 U.S. 83 (1980) .

21 Although the United States Supreme Court has not considered the corroboration
22 requirements when an affidavit contains multiple layers of hearsay, the Courts of Appeals and the
23

24
25 ⁷ In Cooper-Smith v. Palmateer, 397 F.3d 1236, 1244 n.33 (9th Cir. 2005), the Ninth
26 Circuit declined to resolve the parties' dispute over whether the Hill or the Kimmelman standard
applies when a petitioner has pled guilty but alleges that counsel acted unreasonably in
connection with a motion to suppress.

1 California courts have.⁸ These courts recognize that “multiple layers of hearsay may support a
 2 finding of probable cause for a search warrant,” United States v. Mathis, 357 F.3d 1200, 1204
 3 (10th Cir. 2004), so long as “a ‘substantial basis’ for crediting the hearsay statements [is]
 4 provided for each level of hearsay, i.e., at the secondary source level as well as the primary
 5 source level.” People v. Love, 168 Cal.App.3d 104, 109-10 (1985); compare United States v.
 6 Campbell, 732 F.2d 1017, 1020 (1st Cir. 1984) (no probable cause when informant, whose
 7 reliability was unknown, gave information to crime victim, who gave it to police).

8 The first hearsay account came from Robin Giffin, the crime victim, whose
 9 statements are considered reliable support for a search warrant affidavit. United States v. Sparks,
 10 265 F.3d 825, 830 (9th Cir. 2001), overruled on other grounds, United States v. Grisel, 488 F.3d
 11 844 (9th Cir. 2007); United States v. Armstrong, 654 F.2d 1328, 1335 (9th Cir. 1981); People v.
 12 Ramey, 16 Cal.3d 263, 268-69 (1976) (“probable cause will not be provided by conclusory or
 13 anonymous informants, but neither a previous demonstration of reliability nor subsequent
 14 corroboration is ordinarily necessary when witnesses to or victims of criminal activities report
 15 their observations in detail to the authorities.”). However, Giffin’s own observations are limited
 16 to these: he had called a telephone number ostensibly belonging to petitioner and received a call
 17 back from someone his caller ID identified as Dana Moyer, at an address in Rocklin; he knew
 18 both petitioner and Forman as customers of the smoke shop; he had seen Forman in the smoke
 19 shop since the robbery and Forman had questioned him about the robbery; he had seen petitioner
 20 driving a blue Ford Expedition; and he had been shown a pipe taken from his shop. Pet., Ex. 5.

21
 22 ⁸ In the hypothetical state court ruling on a motion to suppress, presented in the post
 23 hearing briefing, respondent chides petitioner for his reliance on Court of Appeals cases.
 24 Respondent’s Post Hearing Brief at 7-8 & n.5. As he notes, the California Supreme Court has
 25 described the impact of Proposition 8: “Our state Constitution thus forbids the courts to order the
 26 exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that
 remedy is required by the federal Constitution as interpreted by the United States Supreme
 Court.” In re Tyrell J., 8 Cal.4th 68, 76 (1994), overruled on other grounds, In re Jaime P., 40
 Cal.4th 128 (2006). When there is no authority from the Supreme Court, decisions of the lower
 federal courts are entitled to great weight, but are not binding. Id. at 79.

1 Detective Allison learned that petitioner was one of the tenants in the apartment rented by Dana
2 Moyer and that he drove a 1998 blue Expedition. Id.

3 Giffin was the conduit for other information, which he received from “a
4 confidential informant,” who had, in turn, received it from a friend. Giffin did not identify the
5 informant who, he reported, feared for his safety. According to Giffin, this informant had
6 refused to name his friend, even in exchange for a \$5,000 reward. Id.

7 According to Giffin, the friend provided the following information: petitioner and
8 Forman confessed to the robbery; petitioner and Forman allowed the friend to use one of the
9 pipes taken in the robbery; the friend allowed the informant, in turn, to take the pipe, which he
10 showed to Giffin, who identified it as one taken in the robbery; petitioner had one of the stolen
11 pipes in his apartment;⁹ the friend obtained petitioner’s telephone number and provided it to the
12 informant, who in turn provided it to Giffin. Id.

13 The affidavit was fleshed out with the following information: petitioner, at 6'2"
14 and 213 pounds matched the description of one of the robbers as 6' tall and 200 pounds and
15 Forman, at 5'8" and 134 pounds matched the description of the other robber as 5'8" to 5'10" and
16 150-170 pounds. In addition, Forman had a prior conviction for brandishing an imitation firearm
17 and one of the victims of the smoke shop robbery described the robbers’ guns as looking “fake
18 and toyish.” Id.

19 The Supreme Court has considered the use of anonymous tips to establish
20 reasonable suspicion or probable cause in several cases. In Illinois v. Gates, supra, the police
21 received an anonymous letter providing the following details about Lance and Susan Gates’ drug
22 dealing activities: the couple lived in a certain condominium complex; Susan Gates generally
23 drove the couple’s car to Florida, where the drugs were loaded, and then flew home; Lance Gates
24 then usually flew to Florida and drove the car home; they stored the drugs in their basement; big

25
26 ⁹ Although the affidavit is not altogether clear on this point, it appears that the pipe the
friend was allowed to use and that Giffin identified was the pipe kept in petitioner’s apartment.

1 drug dealers often visited their home. Police then confirmed the couple's address and the fact
2 that Lance had a reservation on a flight to West Palm Beach. When Lance landed in Florida,
3 police followed him to a Holiday Inn, to a room registered to his wife. The next morning police
4 observed the couple leave the hotel and head north. Police obtained a warrant and searched the
5 Gates's home and car when they arrived from Florida. 462 U.S. at 213.

6 In Gates, the Supreme Court overruled its previous decisions of Aguilar v. Texas,
7 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), which required that
8 courts evaluate an informant's veracity and basis of knowledge, adopting instead a totality of the
9 circumstances test. Gates, 462 U.S. at 230-31. It noted that "our decisions applying the totality-
10 of-the-circumstances analysis . . . have consistently recognized the value of corroboration of
11 details of an informant's tip by independent police work." Id. at 241.

12 The corroboration of the letter's predictions that the Gates' car
13 would be in Florida, that Lance Gates would fly to Florida in the
14 next day or so, and that he would drive the car north toward
15 Bloomingdale all indicated, albeit not with certainty, that the
16 informant's other assertions also were true. . . . It is enough, for
purposes of assessing probable cause, that corroboration through
other sources of information reduced the chances of a reckless or
prevaricating tale, thus providing a substantial basis for crediting
the hearsay.

17 Id. at 244-45 (internal citation & quotation omitted).

18 Finally, the anonymous letter contained a range of details relating
19 not just to easily obtained facts and conditions existing at the time
20 of the tip, but to future actions of third parties ordinarily not easily
21 predicted. The letter writer's accurate information as to the travel
plans of each of the Gates was of a character likely obtained only
from the Gates themselves, or from someone familiar with their not
entirely ordinary travel plans.

22 Id. at 245.

23 In Alabama v. White, 496 U.S. 325 (1990), the underlying facts involved the
24 police receiving an anonymous telephone call, reporting that Vanessa White would be leaving a
25 particular apartment at a particular time in a brown Plymouth station wagon with a broken right
26 tail light and would be going to a particular motel, in possession of drugs in a brown briefcase.

1 Id. at 327. Police watched White leave the building containing the named apartment with
 2 nothing in her hands, get into the brown Plymouth station wagon with its broken right tail light,
 3 and head toward the named motel. Police stopped the car and, with White's consent, found a
 4 brown briefcase containing drugs. Id. Relying on Gates, the Court recognized that the tip by
 5 itself would not provide the police with the reasonable suspicion to stop White's car, because the
 6 tip did not disclose how the informant had obtained the information or provide any basis upon
 7 which to judge the tipster's veracity. The Court found the stop proper nevertheless for even
 8 though "the tip was not as detailed, and the corroboration was not as complete," the required
 9 degree of suspicion was not as great. Id. at 329. The Court observed:

10 [B]ecause an informant is shown to be right about some things, he
 11 is probably right about other facts that he has alleged, including the
 12 claim that the object of the tip is engaged in criminal activity.

13
 14 We think it also important that, . . . the anonymous [tip] contained
 15 a range of details relating not just to easily obtained facts and
 16 conditions existing at the time of the tip, but to future actions of
 17 third parties not easily predicted. The fact that the officers found a
 18 car precisely matching the caller's description in front of the 235
 19 building is an example of the former. Anyone could have
 "predicted" that fact because it was a condition presumably
 existing at the time of the call. What was important was the
 caller's ability to predict respondent's *future behavior*, because it
 demonstrated inside information. . . . When significant aspects of
 the caller's predictions were verified, there was reason to believe
 not only that the caller was honest but also that he was well
 informed, at least well enough to justify the stop.

20 Id. at 331-32.

21 Finally, in Florida v. J.L., 529 U.S. 266 (2000), an anonymous caller told Miami
 22 police that a young African-American man standing at a particular bus stop and wearing a plaid
 23 shirt was carrying a gun. Police saw three black men at the bus stop; J.L. was wearing a plaid
 24 shirt. Id. at 268. Police frisked J.L. and found a gun.

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1 The Supreme Court upheld the Florida courts' suppression of the weapon:

2 The anonymous call concerning J.L. provided no predictive
3 information and therefore left the police without means to test the
4 informant's knowledge or credibility. . . . All the police had to go
5 on was the bare report of an unknown, unaccountable informant
6 who neither explained how he knew about the gun nor supplied
7 any basis for believing that he had inside information about J.L.

8 Id. at 271. The Court recognized, as the state argued, that the tipster provided an accurate
9 physical description of J.L.:

10 An accurate description of a subject's readily observable location
11 and appearance is of course reliable in this limited sense: It will
12 help the police correctly identify the person whom the tipster
13 means to accuse. Such a tip, however, does not show that the
14 tipster has knowledge of concealed criminal activity. The
15 reasonable suspicion here at issue requires that a tip be reliable in
16 its assertion of illegality, not just in its tendency to identify a
17 determinate person.

18 Id. at 272.¹⁰

19 In this case, the friend told the informant who told Giffin that Forman and
20 petitioner had admitted to the robbery and had allowed him to use a pipe taken in the robbery, a
21 pipe which he loaned to the informant who, in turn, showed it to Giffin. The friend also said a
22 stolen pipe was in petitioner's apartment; nothing in the affidavit suggests how he came by this

23 ¹⁰ Respondent suggests that the friend, whom he calls the tipster, was not really
24 anonymous and therefore could not lie with impunity because the police could eventually track
25 him down through Giffin, to the informant and ultimately to the friend. Under this scenario, the
26 tipster's reliability is ensured because he will fear adverse consequences if he is lying.
Respondent's Post Hearing Brief at 11-12. The court is not persuaded by this scenario. There is
nothing in the affidavit itself, nor was there anything presented to this court or to the state
magistrate, which shows that the tipster gave information to the informant in the expectation it
would be passed to Giffin, much less to the police. Moreover, to the extent respondent suggests
that the tipster's statement is against penal interest—he admitted receiving stolen property, in
essence—the court rejects it as a basis for finding his statements reliable. Although the Supreme
Court has recognized that a statement against penal interest carries indicia of reliability, it did so
in a case in which the police knew the identity of the informant. United States v. Harris, 403
U.S. 573, 575, 585 (1971) (“[t]he police ... almost certainly knew [the informant's] name” and
had “a sworn verbal statement” from the informant.).

1 knowledge. Finally, the friend provided petitioner's telephone number to the informant, who, in
2 turn, passed it on to Giffin. The friend did not provide petitioner's address; rather, Giffin used
3 the telephone number and his caller ID to find an address.

4 That the friend had access to the proceeds of the robbery suggests that he did, in
5 fact, secure his knowledge of the crime from the robbers. Yet the tipster's access to the pipe by
6 itself does not show that the pipe would be found at petitioner's apartment. United States v.
7 Campbell, 732 F.2d 1017, 1020 (1st Cir. 1984) ("Shell casings could come from anywhere. One
8 could not find probable cause that defendant was presently in possession of a 30 calibre rifle on
9 the basis that a hitherto unknown informant had said that some other individual, known only to
10 him, had given him a casing, at some undisclosed date, allegedly coming from such a rifle in
11 defendant's possession."). Moreover, the friend's tip did not include the range of detail nor did it
12 provide any predictive information that might show the reliability of the overall tip. Gates, 462
13 U.S. at 245; People v. Terrones, 212 Cal.App.3d 139, 149 (1989) (an explicit and detailed tip is
14 entitled to greater weight). Accordingly, even if this court concludes that the information
15 provided shows the basis of the friend's knowledge, there is not enough information from the tip
16 itself for a neutral state court magistrate to have determined its reliability.

17 In addition, there is almost nothing in the affidavit about the informant, the second
18 hearsay declarant. According to Giffin, the informant received his information directly from the
19 friend, but the information itself provides nothing suggesting its reliability. It is true, according
20 to Giffin, that this informant turned down the reward Giffin had offered, but this is insufficient in
21 itself to show the reliability of the information provided.

22 As noted above, the Supreme Court has recognized that corroboration of an
23 anonymous tip may show the tipster was both honest and sufficiently informed to support a
24 search. Alabama v. White, 496 U.S. at 332; Gates, 462 U.S. at 245. In this case, Allison verified
25 that petitioner lived at the address tied to the telephone number provided by the friend and
26 determined that petitioner drove a blue Ford Expedition, as Giffin had reported. He also

1 determined that Forman had a record for brandishing an imitation firearm and that petitioner and
2 Forman matched the sketchy descriptions of the robbers. This also is not sufficient.

3 In J.L., 529 U.S. at 272, the police had corroborated the anonymous tip by
4 observing that a black male was standing where the tipster said he would be and was wearing a
5 plaid shirt. The Court found this insufficient because the corroboration did nothing to show that
6 the tip was reliable in its “assertion of illegality.” The federal Courts of Appeals and the
7 California courts also recognize that corroboration of innocent detail is insufficient. United
8 States v. Wilhelm, 80 F.3d 116, 120-21 (4th Cir. 1996) (confirmation of “innocent static details”
9 insufficient to support an anonymous tip; in this case, officer corroborated informant’s directions
10 to a house, where he claimed to have seen the residents sell marijuana; “[a]lmost anyone can give
11 directions to a particular house without knowing anything of substance about what is going on
12 inside that house”); United States v. Leake, 998 F.2d 1359, 1365 (6th Cir. 1993) (caller said
13 residents of a particular house had marijuana in the basement; police verified that the house had a
14 basement; this was insufficient); Higgason v. Superior Court, 170 Cal.App.3d 929, 940 (1985)
15 (officers verified “pedestrian facts”—defendant’s address and physical description, but did not
16 corroborate any of the information pertaining to the criminal activity; insufficient to establish
17 probable cause).

18 As noted above, the tipster in this case was able to produce a stolen pipe, which
19 the informant showed to Giffin. Giffin, who is presumed to be reliable, identified the pipe as one
20 taken in the robbery. As respondent argues, this does show that the tipster “had inside
21 information” about the robbers; it does not show that he had inside information about petitioner.
22 Allison did nothing to corroborate “the informant’s most serious allegation,” that petitioner was
23 the robber and had proceeds from the robbery in his apartment. United States v. Tuter, 240 F.3d
24 1292, 1297 (10th Cir. 2001); Campbell, 732 F.2d at 1020 (informant could have received shells
25 anywhere; his claim that he received them from defendant did not establish probable cause to
26 believe that defendant had a rifle).

1 B. Leon

2 The determination that the affidavit in support of the search warrant did not
3 establish probable cause to search petitioner's apartment does not end the inquiry. In United
4 States v. Leon, 468 U.S. 897, 919-21 (1984), the Supreme Court held that when an officer acts
5 "in the objectively reasonable belief that [his] conduct did not violate the Fourth Amendment,"
6 evidence seized under the authority of a search warrant that is later invalidated should not be
7 suppressed. The Court defined its test as an objective one, but one which "requires officers to
8 have a reasonable knowledge of what the law prohibits." Id. at 919 n.20. While it recognized
9 that each inquiry would be fact specific, it found four situations in which reliance on an
10 invalidated warrant could not be deemed to be in good faith: (1) the affiant knowingly or
11 recklessly misleads the magistrate with false information or material omissions; (2) the
12 magistrate "wholly abandoned his judicial role;" (3) the affidavit is "so lacking in indicia of
13 probable cause as to render official belief in its existence entirely unreasonable," and (4) the
14 warrant itself is facially deficient in its description of the place to be searched or the things to be
15 seized. Id. at 923; see also People v. Camarella, 54 Cal.3d 592, 596 (1991) ("we distill from
16 Leon . . . the following: If a well-trained officer should reasonably have *known* that the affidavit
17 failed to establish probable cause (and hence that he should not have sought a warrant), exclusion
18 is required under the third situation described in Leon . . ."). For the good faith exception to
19 apply, "the officer's affidavit must establish at least a colorable argument for probable cause."
20 United States v. Luong, 470 F.3d 898, 903 (9th Cir. 2006). This standard is met if the affidavit
21 provides "evidence sufficient to create disagreement among thoughtful and competent judges as
22 to the existence of probable cause." Leon, 468 U.S. at 926. If a warrant would be "saved" by the
23 good faith exception, then a habeas petitioner has not shown the prejudice necessary to support
24 his claim of ineffective assistance of counsel. Williams v. Locke, 403 F.3d 1022, 1026 (8th Cir.
25 2005).

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1 Several courts have found the good faith exception inapplicable when police
2 corroborate only the innocent details of an anonymous tip. In United States v. Helton, 314 F.3d
3 812, 816 (6th Cir. 2003), the court considered Leon's application to an affidavit based on
4 information from a known, credible informant who, in turn, received information from an
5 unknown, anonymous tipster who reported seeing cash in a particular house and recounted
6 statements from one suspect about her role in drug dealing. The known informant described the
7 house the tipster had visited; the police determined that the three suspects had been in frequent
8 telephone communication and confirmed that the person named by the tipster lived in the house
9 the tipster claimed to have visited. The court rejected the government's argument that the search
10 was saved by the good faith exception: "at a minimum, a reasonable officer would have sought to
11 corroborate FBI-A's statements further" because the tipster's statements had little weight.
12 Id. at 824-25; see also Leake, 998 F.2d at 1367 (officer did not rely in good faith on warrant
13 when affidavit recounted tips from anonymous informants corroborated only as to innocent
14 details); United States v. Wilhelm, 80 F.3d 116 (4th Cir. 1996) (anonymous tip with nothing
15 showing informant's truthfulness or reliability, corroborated only as to innocent detail; Leon does
16 not apply). In these cases, the anonymous informants provided their descriptions of criminal
17 behavior and the police verified only innocent details.

18 In contrast, in United States v. Clark, 31 F.3d 831, 834-36 (9th Cir. 1994), an
19 anonymous informant told police that Clark had moved to Alaska with another man to grow
20 marijuana. The affiant corroborated this story by his observation that Clark's electricity use was
21 high, that those who grow marijuana indoors often use substantial amounts of electricity, and that
22 the house had other sources of power. The Ninth Circuit found this corroboration insufficient to
23 establish probable cause, but an adequate basis for application of the good faith exception to the
24 exclusionary rule. In United States v. Danhauer, 229 F.3d 1002 (10th Cir. 2000), an anonymous
25 informant told police that the Danhauers were cooking methamphetamine in their home and that
26 a person named Casey acted as a lookout. An officer confirmed the description of the

1 Danhauer's property and observed Robbi Danhauer making several trips between home and
2 garage. He also learned that both suspects had criminal records related to drugs and
3 paraphernalia as well as other offenses and that Robbi, on probation, had submitted a urine test
4 that was positive for methamphetamine. The Tenth Circuit found that the affidavit did not
5 support probable cause because it did not demonstrate the informant's basis of knowledge or
6 "adequately verify the informant's most serious allegation, that the Danhauers were
7 manufacturing methamphetamine." Id. at 1004. Nevertheless, the court found the good faith
8 exception applied: "the absence of information establishing the informant's reliability or basis of
9 knowledge does not necessarily preclude an officer from manifesting a reasonable belief that the
10 warrant was properly issued . . . particularly when the officer takes steps to investigate the
11 informant's allegation." Id. at 1007. The officer's investigation provided a sufficient link
12 between the informant's statements and criminal activity.

13 This case does not fit neatly into a Leon analysis. It is true that Detective Allison
14 did little to corroborate the friend's tip, which passed through the informant to Giffin. The
15 friend, however, was able to produce property taken during the robbery, a tangible connection to
16 the crime. In cases finding Leon inapplicable, informants gave information, but none of the
17 information relating to the crime was corroborated. In this case, the friend gave the informant
18 fruits of the crime, which Giffin was able to identify. It is true, as petitioner argues, that the
19 friend could have been lying about the source of the pipe and it is because of that possibility that
20 the affidavit could not establish probable cause without further corroboration. The inquiry is
21 different for the application of the good faith exception, however: would a reasonably trained
22 officer understand that the warrant was necessarily deficient when the crime victim was able to
23 identify some of his stolen property, presented to him by someone known to him, who declined a
24 \$5,000 reward?

25 There is more. Two deputy district attorneys reviewed the affidavit before Allison
26 presented it to the reviewing magistrate, PEHE, Ex. 6 at 12, a factor this court must consider in

1 evaluating objective good faith reliance on an affidavit. United States v. Mendonsa, 989 F.2d
2 366, 369 (9th Cir. 1993); United States v. Johnson, 78 F.3d 1258, 1264 (8th Cir. 1996).

3 The ultimate result cannot be based on what this court might do if considering the
4 affidavit on direct review. Applying Leon to the facts of this case, the good faith exception to the
5 exclusionary rule is satisfied.

6 C. Other Matters

7 Burdick's billing records contain no claim for research, but do contain time spent
8 in reviewing discovery and preparing for court. Burdick testified he considered filing a motion to
9 suppress, but rejected such a motion as too risky in light of petitioner's potential exposure and
10 the strength of the evidence. Had the motion to suppress been successful, the physical evidence
11 and petitioner's confession would have been suppressed. Burdick testified without contradiction
12 that a co-defendant, presumably Joshua Merritt, had agreed to testify against petitioner. Nothing
13 in the record confirms this, yet nothing contradicts it either. Because of this, the court cannot say
14 that reasonable professional judgment would necessarily favor pursuing a motion to suppress
15 with a chance, but no guarantee, that Leon could be overcome.

16 Finally, this court of course must apply the AEDPA rather than decide the case de
17 novi. Under the AEDPA's stringent standards, the court cannot say that the state court's
18 determination was unreasonable or contrary to federal law.

19 Accordingly, IT IS HEREBY RECOMMENDED that the petition for a writ of
20 habeas corpus be denied.

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1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
3 days after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
6 shall be served and filed within ten days after service of the objections. The parties are advised
7 that failure to file objections within the specified time may waive the right to appeal the District
8 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 DATED: March 31, 2008.

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12 U.S. MAGISTRATE JUDGE
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